SUPREME COURT U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1240

Supreme Court, U.S.
FILED
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CREAM CREST-BLANDING DAIRIES, INC.,
Petitioner,

-v-

NATIONAL DAIRY PRODUCTS CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 11, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 11, is reported in 243 F.Supp. 331. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 10, is reported in 370 F.2d 332.

JURISDICTION

The judgment of the Circuit Court of Appeals, *infra*, p. 16, was entered on January 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether sales in Michigan by a Delaware corporation which does business in many states and which advertises, operates, and sets policies on a nationwide basis, of products purchased and processed by it entirely within the State of Michigan, are sales "in commerce" as that term is used in the Robinson-Patman Act.

STATUTE INVOLVED

The statutory provision involved is Section 2(a) of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(a). It is printed in Appendix A, *infra*, p. 10.

STATEMENT

This is an action for treble damages under Section 13(a) of the Clayton Act (Section 2(a) of the Robinson-Patman Act). The jurisdiction of the District Court was invoked because the case arises under the Clayton Act.

Petitioner is a Michigan corporation conducting business as a handler of milk, milk products, and related items in the area around Greenville, Michigan. (*Infra*, p. 11.) Respondent is a Delaware corporation operating in Michigan and other states as a dairy and handler of milk, milk products and related items under the nationally advertised trade name "Sealtest." (*Infra*, p. 12; Appendix Below, pp. 12a, 23a-26a.)[1] Respondent's operations in the Greenville area are conducted through a processing plant and distribution center in Lansing, Michigan. This facility is a part of respondent's Michigan District, which includes areas in Ohio. (*Infra*, p. 12.) Ultimate control of respondent's Lansing operation

rests in officers and employees outside the state of Michigan. (*Infra*, p. 12.) The milk and milk products sold by respondent are processed in Michigan from milk purchased in Michigan. (Appendix Below, pp. 33b-34b.)

The amended complaint alleges price discrimination by respondent in the sale of milk, milk products, and related items within the state of Michigan. (Appendix Below, pp. 9a-11a.) At the completion of discovery, respondent moved for summary judgment on the ground that none of the purchases involved were in commerce. (Appendix Below, pp. 26a-28a.) The District Court granted respondent's motion for summary judgment on the ground that the alleged discrimination did not occur "in commerce," and the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of this Court in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). In *Moore*, the defendant was one of an affiliated group of corporations operating in several states. With the exception of a single truck route into Farwell, Texas, defendant operated solely in New Mexico. When defendant cut its prices in the area where it competed with plaintiff, but not elsewhere, an action was brought under Section 2(a) of the Robinson-Patman Act. Reversing the determination of the Court of Appeals below, this Court held in *Moore* that the commerce requirement of the Robinson-Patman Act was satisfied, stating that "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business." 348 U.S. at 120. The Court's reasoning does not rely on the chance existence of the Farwell truck:

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[1] The record was not paginated by the Court of Appeals, and references, therefore, will be made by title to individual items within the record. The term "Appendix Below" will be used to refer both to Appellants' Appendix (page numbers followed by "a") and Appellees' Appendix (page numbers followed by "b").

"We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; *and no interstate transactions are used to destroy him.* But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade." 348 U.S. at 119. (Emphasis added.)

In *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied* 373 U.S. 934 (1963), the Sixth Circuit Court of Appeals had presented to it a case virtually identical to the present one. Reading *Moore* to turn on the existence of the Farwell truck route, the Sixth Circuit held in *Willard* that the commerce requirement of the Robinson-Patman Act was not met. Although this Court denied certiorari in *Willard*, Mr. Justice Black dissented from the denial:

"Moreover, I think the result below is irreconcilable with this Court's decision in Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954), in which we said that the Robinson-Patman Act condemns the monopolistic practice under which profits made in nondiscriminatory

interstate transactions are used to offset losses arising from discriminatory price-cutting at the local level. I believe that the Court of Appeals in the present case misconstrued both the statute and Moore when it held that respondent's interstate shipments 'from other than its Shelby, Ohio, plant' were 'wholly immaterial' to this case. Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent. The present case presents an important question of price-cutting by interstate business with local plants, each of which services largely a local area but all of which draw on the economic power of the national operation. Judgments like the one left standing here make it difficult indeed for small independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors." 373 U.S. 934 (1963).

2. The decision below conflicts with the interpretation placed upon the Robinson-Patman Act by the Federal Trade Commission, which is the agency charged with its administration. In *The Borden Co.*, F.T.C. Docket 7474, the Commission held that sales in Ohio by a Ohio plant of The Borden Company of milk purchased and processed in Ohio were "in commerce" as that term is used in the Robinson-Patman Act. The Commission stated:

> "Products sold by the large concern are truly products of the entire enterprise, not just the product of each local plant which happens to manufacture and distribute it. These economic characteristics of the large, modern, multistate corporation make archaic reliance on purely physical concepts when determining whether a product is in commerce. A product is in commerce when the forces establishing its price structure or distributional policy cross state lines."

In reaching this decision, the Commission relied upon *Moore* and specifically repudiated *Willard*. In *Borden Co. v. Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964), the Seventh Circuit Court of Appeals reversed the Commission on this

point, relying principally upon the holding of the Sixth Circuit in *Willard*.

3. The question here presented is of paramount importance in the administration of the Robinson-Patman Act. As witnessed by the recent milk strikes, the milk industry has a substantial impact on the United States economy. Furthermore, the milk industry is not alone in its susceptibility to selective price-cutting by large interstate concerns with localized operations. If the holding in *Willard* and in the present case is allowed to stand, small, independent, local companies will find it difficult to survive against their interstate competitors.

4. For the reasons stated above, the decision below is clearly erroneous and is an error of such importance that it should be reversed. In its decision in *The Borden Co.*, the Federal Trade Commission held that price-cutting of the nature involved there, and in this case, was precisely the "sort of commercial warfare which, indeed, the Robinson-Patman Act was designed to prevent."

All of the purchases involved in this case were made upon terms and conditions ultimately controlled by respondent's officers located outside the state of Michigan. All payments received by respondent accrued to its corporate treasury located outside the state of Michigan. This same treasury, drawn from sales in many states, served to finance the price-cutting employed by respondent. Whether predatory price-cutting falls within the prohibitions of the Robinson-Patman Act cannot turn upon whether or not physical molecules of milk cross an imaginary political boundary. A "purchase" is more than a mere delivery of goods. In the present case, all of the incidents of the purchases involved other than the mere physical delivery of the goods were interstate in nature.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: April 7, 1967.

Respectfully submitted,

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